Case No: Case No: C5/2013/1029, C5/2013/0377, C5/2013/0590, C5/2013/1244, C5/2013/0977 & C5/2013/0883

Neutral Citation Number: [2015] EWCA Civ 40

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/01/2015

Before :

LORD JUSTICE LAWS
LORD JUSTICE SULLIVAN
and
LORD JUSTICE UNDERHILL

- -

Between :

GS (India), EO (Ghana), GM (India), PL (Jamaica), BA (Ghana) & KK (DRC)	**Appellants**
- and -	
The Secretary of State for the Home Department	**Respondent**

- -
- -

Ms Nathalie Lieven QC (EO & GS) Declan O'Callaghan and Jacqueline Lean (GS) Ms Miriam Carrion Benitez (EO) (instructed by **Jasvir Jutla & Co Solicitors and Irving & Co Solicitors)** for the **1st and 2nd Appellants**
Mr Raza Husain QC (GM, PL, and BA) Mr Duran Seddon (GM, PL and BA) Ms Rebecca Chapman (BA) and Ms Gemma Loughran (PL) (instructed by **Birnberg Peirce & Partners, Turpin Miller LLP and Hardings Solicitors)** for the **3rd, 4th and 5th Appellants**
Mr Manjit Gill QC and Ms Shazia Khan (KK) (instructed by **Parker Rhodes Hickmotts**) for the **6th Appellant**
Ms Lisa Giovannetti QC and Ms Lisa Busch (instructed by **The Treasury Solicitor**) for the **The Secretary of State for the Home Department**

Hearing dates: 3-5 November 2014

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Judgment

LORD JUSTICE LAWS:

INTRODUCTION

1. These six appeals are before the court with permission granted by Maurice Kay LJ at an oral hearing on 12 March 2014. In each case the appeal is against a determination of the Upper Tribunal (the UT), which dismissed the appellant's appeal against the decision of the Secretary of State removing him from the United Kingdom. All six suffer from serious medical conditions which are being effectively treated in this country. Five of them, some more certainly than others, would be at risk of a very early death if returned to their home States. In the sixth case the evidence suggests a somewhat longer period. They challenge the removal decisions as being repugnant to their rights guaranteed by Articles 3 and 8 of the European Convention on Human Rights. The appeals require close consideration of the judgments of the European Court of Human Rights in *D v United Kingdom* (1997) 25 EHRR 31 and *N v United Kingdom* (2008) 47 EHRR 39, and the preceding House of Lords decision in the latter case, *N v Secretary of State* [2005] 2 AC 296, [2005] UKHL 31. The first reason given by Maurice Kay LJ for granting permission was that there were "arguable issues as to the precise scope of *D* and *N*, given the factual circumstances in which those decisions were made. They concern effectively illegal entrants who can properly be described as 'health tourists'. None of these six appellants falls into that category…" He granted permission "with a view to this court producing a judgment on the scope and application of the existing authorities…"

2. GM has a free-standing ground of appeal which the Secretary of State is content to concede. The contention is that the removal decision in GM's case, made on 8 May 2012, was unlawful because it was contained in a notice which also included the Secretary of State's decision refusing an application by GM for variation of his leave to remain. That is not permissible, as is shown by this court's judgment in *Ahmadi* [2013] EWCA Civ 512, [2014] 1 WLR 401, in which it was held that notification of a variation decision is a pre-condition of the power to direct removal under s.47 of the Immigration Asylum and Nationality Act 2006.

3. The Secretary of State also accepts that it is arguable that the UT in GM's case failed adequately to consider the appellant's claim under ECHR Article 8; and she is also ready to receive fresh representations in EO's case because of a change in circumstances since the decision of the UT.

FACTS

4. Five of the six appellants are suffering from terminal renal failure, or end stage kidney disease (ESKD). The sixth (KK) is at an advanced stage of HIV infection. The skeleton argument prepared for GM, PL and BA by Mr Husain QC contains a very helpful summary of the salient features from which they, together with GS and EO, are suffering. The following description draws on that material.

ESKD

5. ESKD is irreversible. Unless the patient receives a kidney transplant he must remain on dialysis for the rest of his life. Dialysis performs 20% - 30% of the work of a functioning kidney. Without dialysis the patient, having minimal urine output, will

likely die within 2-3 weeks. Even with dialysis, the patient will in time suffer life-shortening complications such as vascular and cardiovascular disease. Dialysis is generally required three times every week, and all five appellants undergo it with that frequency. It is an out-patient procedure, involving on each occasion as much as four hours treatment and two hours preparation and follow-up. It is enervating and exhausting. The patient also takes medicines prescribed for accompanying conditions, not least hypertension, and is potentially subject to a range of adverse events including stroke and heart attack.

6. The beneficial effects of a transplant are dramatic. It may provide a substantial increase in life expectancy and may revitalise the patient's quality of life. He is released from a regime of dialysis, can eat and drink as he chooses, travel, and work. He must however take immuno-suppressant drugs for life. A transplant from a living donor is likely to have a significantly better outcome than one from a deceased donor. There is a shortage of donors. Within the NHS there is a scheme by which, where a live donor and the patient who would receive his kidney are not medically compatible, they may enter into a "pool" of other donor-recipient pairs, so that within the pool compatible donors and recipients are matched. NHS Blood and Transplant (NHSBT) carries out a quarterly "matching run" among all the pairs in the scheme using an appropriate computer programme.

KK: HIV

7. KK, as I have indicated, is at an advanced stage of HIV infection. He has also suffered from hypertension and depression, and is at risk of opportunistic infections. He needs (and is receiving) antiretroviral therapy and is on other medications for associated conditions. I will come to the factual history in this case and the other appeals directly, but I note that the Upper Tribunal in its determination of 31 January 2013 (paragraph 55) accepted evidence that if KK were unable to receive the treatment and care which was then being administered his life expectancy would be reduced to "months, or if lucky, a year or two".

8. Now I will turn to the individual case histories.

GM

9. GM is a national of India born on 20 September 1986. He arrived in the UK on 9 September 2010 with an entry clearance as a Tier 4 (General) Student and leave to remain until 30 March 2012. He came to study for an MBA. However on 17 November 2010 he was admitted to Guy's Hospital diagnosed with ESKD and hypertension. He was started on dialysis and has been on a 3-sessions per week regime since, together with other medications to treat his blood pressure. He had to give up his full time MBA studies in early 2011. On 16 November 2011 he applied for further leave to remain so that he might continue his treatment: it was said that to return him to India would reduce his chances of receiving efficient and affordable medical care. His application had not been decided by 30 March 2012, when his current leave expired: his leave was accordingly extended by statute (Immigration Act 1971 s.3C) pending the Secretary of State's decision and any appeal, including appeal to this court. His leave therefore remains extended while these proceedings are extant. In these circumstances it is clear that he has always been lawfully present in the United Kingdom.

10. The Secretary of State refused GM's November 2011 application on 8 May 2012 and directed his removal from the United Kingdom. It is to be noted that before that, his friend Emmanuel Mugisha had offered to donate a kidney; but in April 2012 Guy's Hospital indicated that the offer was not then being carried forward having regard to GM's immigration status.

11. GM's appeal against the Secretary of State's decision was dismissed by the First-tier Tribunal (the FTT) on 25 July 2012. The FTT granted permission to appeal to the UT. On 30 September 2012 the UT held that there had been no error of law by the FTT, whose decision should therefore stand.

12. GM suffers from depression as well as his major kidney disease, and there is evidence of a risk of suicide. On 30 May 2014, by contrast with their position in 2012, Guy's Hospital indicated their willingness to assess GM's suitability for a live donor transplant; and by 1 July 2014, it was clear that the proposed donor, Emmanuel Mugisha, was compatible.

13. As I have indicated the Secretary of State consents to GM's appeal being allowed and remitted to the Upper Tribunal for further consideration of his claim under Article 8.

PL

14. PL is a national of Jamaica born on 7 October 1965. He was admitted to the United Kingdom on 19 July 2001 with a visitor's leave until 17 August 2001. He obtained extensions of his leave as a student, ultimately until 31 October 2002. Since then he has overstayed. On 2 May 2012 he claimed asylum, stating however that the "real issue" was his medical condition. He had first been diagnosed as suffering from renal impairment in November 2005, but by February 2009 had advanced kidney failure and has been maintained on twice weekly dialysis sessions ever since then. He too has hypertension and depression. His asylum claim was refused on 7 August 2012. He appealed to the FTT on Article 3 grounds, asserting both a fear of ill treatment by reason of his political affiliations if he were returned to Jamaica, and that he would die within weeks if he did not receive regular dialysis. He was said to be awaiting a kidney transplant.

15. The FTT dismissed his appeal on 26 September 2012. But they made an extra-statutory recommendation to the Secretary of State (paragraph 32) to the effect that there was "ample scope" for her to allow PL to remain as a matter of discretion so that he might obtain a transplant.

16. The UT on appeal held that there had been no error of law by the FTT. Their determination was promulgated on 14 January 2013. Apart from all the other material, they had before them a statement from PL's solicitor that PL had been taken to hospital following a suicide attempt by consumption of excess alcohol: alcohol is incompatible with dialysis. There is evidence since the UT decision that as at 8 July 2014 it was being anticipated that PL would be "activated" on the transplant waiting list within three months. He has also been found to be suffering from epilepsy.

BA

17. BA is a Ghanaian born on 15 October 1970. He left Ghana in 1998, returning from time to time; he left for the last time in 2000. In 2003 or 2004 he entered the UK illegally. He appears to have been diagnosed as suffering from ESKD and HIV in July 2005. It seems he had previously been diagnosed in Ghana as suffering from malignant hypertension. In 2005 in this country he was started on twice weekly dialysis and antiretroviral treatment. On 24 April 2006 he sought leave to remain on human rights grounds, making claims under Articles 3 and 8 and citing his medical predicament. The application was refused on 1 September 2010. BA appealed. On 9 December 2010 the FTT allowed his appeal under Article 3, making no finding under Article 8. The Secretary of State appealed with permission to the UT. On 14 November 2011 the UT allowed the Secretary of State's appeal, stressing (paragraph 3) that it was nevertheless open to the Secretary of State to grant BA leave to remain as a matter of discretion.

18. BA appealed to this court, and on 23 May 2012 the appeal was allowed by consent and the case remitted to the UT on the footing that the UT had failed to address a positive finding by the FTT, namely that BA would not be able to afford medical treatment in Ghana (see FTT paragraph 14).

19. And so the matter went back before the UT which promulgated its decision on 24 January 2013. Again, the Secretary of State's decision was upheld.

GS

20. GS is an Indian national born on 1 March 1981. He entered the UK on 1 November 2004 with entry clearance as a working holidaymaker with leave valid until 29 October 2006. He overstayed. In 2008 he was found to be suffering from hypertension. On 5 January 2009 tests revealed kidney problems. In fact he has only one kidney; this is apparently a congenital condition. He has ESKD and has been on thrice-weekly dialysis since 2009. On 28 January 2009 he applied for leave to remain in the United Kingdom on account of his medical condition. That was refused by the Secretary of State on 12 March 2010. GS's appeal to the FTT was allowed on 14 June 2010, but the UT overturned that decision on 23 February 2011, holding that no violation of Articles 3 or 8 was established. GS appealed to this court with permission granted by Toulson LJ, as he then was. The case was remitted by consent to the UT on 6 February 2012. On 17 October 2012 the UT again upheld the Secretary of State's decision in a determination which dealt also with EO's case.

EO

21. EO is a Ghanaian national born on 24 January 1970. He has a wife and son in Ghana. On 25 March 2005 he entered the UK on a short-term work permit valid until 1 April 2005 allowing him to work as a musician. Thereafter he overstayed his leave. In early 2006 he was diagnosed with ESKD and malignant hypertension. He has been on dialysis ever since.

22. EO was arrested under immigration powers on 1 March 2010. He claimed asylum on 15 April 2010. That was refused on 5 May 2010 by the Secretary of State who also declined to grant leave to remain on Article 3 and 8 grounds. On 17 June 2010 the FTT allowed his appeal under Article 3; the asylum claim played no separate part. By

then EO had had access to the resources of the NHS for some five years using a false name.

23. On 2 December 2010 the UT set aside the FTT's determination and dismissed EO's appeal under Articles 3 and 8. However on appeal to this court the matter was remitted to the UT. The UT held that the FTT had erred in law in allowing the appeal, and directed a fresh hearing before a full panel of the UT. In the UT the case was joined with that of GS. On 17 October 2012 the UT again dismissed EO's appeal.

24. There has been an important development since. In October 2013 EO underwent a kidney transplant from a deceased donor. He attends the renal transplant clinic twice a month, and monitoring of his kidney function and of the effect of his prescribed drugs will be necessary into the future. The Secretary of State invites EO to submit a fresh Article 8 claim having regard to these developments.

KK

25. KK is a national of the Democratic Republic of the Congo (DRC) born on 24 September 1968. He arrived in the UK on 2 June 1995 and claimed asylum. That was refused on reconsideration by the Secretary of State on 8 July 2002. However, KK was granted exceptional leave to remain until 8 July 2006. The month before, on 6 June 2006, he had applied for indefinite leave to remain. That was granted to him on 13 April 2007.

26. KK had been diagnosed HIV positive in 2005. He did not however comply with his prescribed medical regimen, and his condition proceeded to an advanced stage, with atypical mycobacterial infection. Details are given in a medical report by Dr Kyi dated 5 May 2011.

27. On 10 July 2010 KK applied to sponsor the entry of his wife to the United Kingdom. On 15 October 2010 that was refused on the ground that false documentation had been used to make the application. KK was prosecuted at the Sheffield Crown Court for possession of false identity documents in November 2009: documents which it seems he had intended to deploy to support his wife's application (which went ahead in July 2010 without their being used). He was also accused of offences of harassment and sexual assault which he had committed while on bail. On 16 December 2010, he was sentenced for all these matters to concurrent and consecutive terms of imprisonment amounting altogether to 20 months.

28. On 16 September 2011 the Secretary of State issued a notice of intention to deport KK pursuant to s.3(5)(a) of the Immigration Act 1971 (not, as the FTT mistakenly thought, under the automatic deportation provisions in the UK Borders Act 2007 relating to foreign criminals). The FTT dismissed his appeal on 10 November 2011. His appeal to the UT was in turn dismissed on 31 January 2013.

The Appellants' Prospects of Treatment

29. It is convenient at this point to collect the facts relating to the prospects for treatment of each appellant on the footing that he is to be returned to his country of origin.

30. In GM's case the FTT did not accept that appropriate medical care would not be available to him in India, nor that he and his family would be unable to meet the cost of it. As I have said the UT found no error of law by the FTT. These findings of course pre-dated the specific prospect that has now arisen of a kidney transplant from GM's friend Emmanuel Mugisha.

31. In PL's case the FTT found (paragraph 16) that access to dialysis in Jamaica is restricted, and that demand far outstrips supply. There was however a lack of evidence as to whether PL would actually obtain treatment: "I am left with a likelihood that he will not be". As I have said it was being anticipated by July 2014 that PL would be "activated" on the transplant waiting list within three months.

32. In *BA* the finding is that the appellant would not have access to dialysis in Ghana on grounds of cost. On return he would, or would be able to, live with his elderly mother. He would suffer a very early death. As was noted by the UT in January 2013 there is a strong similarity with the cases of GS and EO.

33. As I have indicated the UT dealt with the cases of GS and EO together on 17 October 2012. It recorded at paragraph 4 that in neither case were the facts in dispute. GS would not be able to obtain dialysis in India owing to its cost. He would die within one or two weeks of his return. EO is in like case. It was "a certainty" that he would be unable to meet the cost of treatment in Ghana. He would die within two or three weeks of his return.

34. In *KK* the UT conducted a full re-hearing on the merits and took oral evidence. In their determination of 31 January 2013 they stated (paragraph 85), "we are satisfied that the appellant would have access to the treatment which he needs in DRC and that he could be supported by family there". I should note that Mr Manjit Gill QC on his behalf has raised a challenge to factual findings made by the UT, and I will come to that.

35. This summary of the facts of each appeal suffices to introduce the issues we must decide, to which I will now turn. It will be necessary to revisit some factual areas in addressing counsel's submissions.

ARTICLES 3 & 8: THE PARADIGM CASES

36. There is some overlap between the arguments on Articles 3 and 8. The appellants' central contention on both Articles is that the consequences to their life expectancy – especially dire for those with ESKD, no transplant, and no or no real prospect of continued dialysis in their home State – are such that their removal or deportation would entail violations of both Articles by the United Kingdom. I will first make some general remarks about the paradigm case, or core instance, of each of the Articles.

37. As is well known Article 3 provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 8:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

38. A foundational instrument such as the ECHR is bound to be cast in general terms. The reach of the value protected by the text is therefore unlikely to be ascertainable from the words alone; so the text's interpretation is not just a linguistic exercise, but also a normative one. The task is not, of course, open-ended. A principled assessment of the scope of Articles 3 and 8 may usefully start with Lord Bingham's exegesis in *Brown v Stott* [2003] 1 AC 681, 703, cited by Lord Hope at paragraph 22 of *N v Secretary of State* [2005] 2 AC 296, [2005] UKHL 31:

> "In interpreting the Convention, as any other treaty, it is generally to be assumed that the parties have included the terms which they wished to include and on which they were able to agree, omitting other terms which they did not wish to include or on which they were not able to agree. Thus particular regard must be had and reliance placed on the express terms of the Convention, which define the rights and freedoms which the contracting parties have undertaken to secure. This does not mean that nothing can be implied into the Convention. The language of the Convention is for the most part so general that some implication of terms is necessary, and the case law of the European Court shows that the court has been willing to imply terms into the Convention when it was judged necessary or plainly right to do so. But the process of implication is one to be carried out with caution, if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept. As an important constitutional instrument the Convention is to be seen as a 'living tree capable of growth and expansion within its natural limits' (*Edwards v Attorney General for Canada* [1930] AC 124, 136 per Lord Sankey LC), but those limits will often call for very careful consideration."

In *N* Lord Hope himself said this at paragraph 21:

> "The Convention, in keeping with so many other human rights instruments, is based on humanitarian principles. There is ample room, where the Convention allows, for the application of those principles. They may also be used to enlarge the scope of the Convention beyond its express terms. It is, of course, to be seen as a living instrument. But an enlargement of its scope in its application to one contracting state is an enlargement for them all. The question must always be whether the enlargement is one which the contracting parties would have accepted and agreed to be bound by."

So the starting-point is the text, and any implication or enlargement requires a careful avoidance of the imposition of obligations beyond the actual or assumed scope of the States parties' agreement. But there is at once a difficulty, unacknowledged in these *dicta*. How is the "living instrument" approach to be reconciled with the court's duty to be loyal to the founders' agreement? The notion that the modern scope of ECHR rights may be resolved by asking whether the States parties might have consented to this or that outcome suggested by circumstances which were or might have been beyond contemplation when the text was agreed is surely problematic. I think the best one can do is to confine any implication or enlargement to situations which have some affinity with the paradigm case; situations which are, so to speak, within the spirit of the paradigm case, whose identification therefore assumes a considerable importance.

39. As regards Article 3 the Strasbourg court has repeated time without number that "to fall within the scope of Article 3 the ill-treatment must attain a minimum level of severity". But this formula is at too high a level of generality to provide, or even suggest, a paradigm. In my judgment the language of the Article shows that the paradigm case of a violation is an intentional act which constitutes torture or inhuman or degrading treatment or punishment. The paradigm of Article 8 is much more diffuse. Unlike Article 3, no single paradigm may be obtained from its language. The overall value which the Article protects may be said to be the quality of life. This idea has been expressed in different ways: *Pretty v UK* (2002) 35 EHRR 1, which I shall cite below, refers variously to personal integrity, autonomy and dignity. But these formulations, like the very idea of the quality of life, are again at far too high a level of abstraction to provide a paradigm. However the cases show, I think, that there are two linked paradigms. One is the capacity to form and enjoy relationships. The other is a right to privacy. Here, we are only concerned with the former.

Article 3

40. These paradigms are well supported by the learning. Thus as regards Article 3, the Strasbourg court in *Bensaid v UK* (2001) 33 EHRR 205 said at paragraph 40:

> "The Court accepts the seriousness of the applicant's medical condition. Having regard, however, to the high threshold set by Article 3, *particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm*, the Court does not find that there is a sufficiently real risk that the applicant's removal in these circumstances would be contrary to the standards of Article 3. The case does not

> disclose the exceptional circumstances of *D v the United Kingdom*… where the applicant was in the final stages of a terminal illness, Aids, and had no prospect of medical care or family support on expulsion to St Kitts." (my emphasis)

41. In *D v UK* (1997) 24 EHRR 423 the Strasbourg court observed at paragraph 49:

> "It is true that this principle [sc. the absolute nature of the Article 3 right, applicable 'irrespective of the reprehensible nature of the conduct of the person in question' – paragraph 47] has so far been applied by the Court in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from *intentionally inflicted acts of the public authorities* in the receiving country or from those of non-State bodies in that country when the authorities there are unable to afford him appropriate protection…" (my emphasis)

42. Next, in *N v UK* (2008) 47 EHRR 39 the Strasbourg court observed at paragraph 31:

> "Article 3 principally applies to prevent a deportation or expulsion where the risk of ill-treatment in the receiving country emanates from *intentionally inflicted acts of the public authorities* there or from non-State bodies when the authorities are unable to afford the applicant appropriate protection…" (my emphasis)

In the same case at paragraphs 42 – 45 the court set out the principles it had applied since the decision in *D.* The paradigm Article 3 case is acknowledged at paragraph 43:

> 43. The Court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling. However, it considers that it should maintain the high threshold set in *D v the United Kingdom* and applied in its subsequent case-law, which it regards as correct in principle, *given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country*. (my emphasis)

43. I shall have to return to both *D* and *N* in the Strasbourg court in addressing the scope of departures from the Article 3 paradigm.

Article 8

44. As I have said, Article 8 has two linked paradigms: the capacity to form and enjoy relationships, and the right to privacy. We are not concerned with the latter (as to which there is a substantial body of case-law). As for the former, I will first cite *Bensaid*, in which the court said at paragraph 47:

> "'Private life' is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8… Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects *a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world*… The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life." (my emphasis)

Paragraph 61 in *Pretty v UK* (2002) 35 EHRR 1 is comparable:

> "As the Court has had previous occasion to remark, the concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person… It can sometimes embrace aspects of an individual's physical and social identity… Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8. *Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world*... Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees." (my emphasis)

The diffuse nature of the Article 8 paradigm is further emphasised by paragraph 65 in *Pretty*:

> "The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance."

45. These and other passages tell us that the core value protected by Article 8 is the quality of life, not its continuance. Life itself is protected by Article 2. And it requires no sophisticated philosophy to tell us that central to the quality of life is the capacity to form and enjoy relationships. Other elements referred to in these authorities, such as gender identification, name, sexual orientation, sexual life and mental health are self-evidently integral to that same capacity.

DEPARTURES FROM THE ARTICLE 3 PARADIGM

46. The case of a person whose life will be drastically shortened by the progress of natural disease if he is removed to his home State does not fall within the paradigm of Article 3. Cases such as those before the court can therefore only succeed under that

Article to the extent that it falls to be enlarged beyond the paradigm. In response to humanitarian imperatives, the Strasbourg court and the House of Lords have accepted a degree of enlargement to Article 3. The starting-point for an examination of these departures is the *D* case.

D v UK (1997) 24 EHRR 423

47. The Secretary of State proposed to remove the applicant to St Kitts. He was a criminal involved with Class A drugs. But he suffered from AIDS and was close to death. In January 1996 his request to remain on compassionate grounds was refused. In June 1996, his life expectancy was stated to be in the region of eight to twelve months even if he continued to receive treatment in the United Kingdom. His health had since declined (judgment, paragraph 41).

48. I have already cited part of paragraph 49 in *D*, as authority for the Article 3 paradigm. In the same paragraph the court continued:

> "Aside from these situations and given the fundamental importance of Article 3 in the Convention system, the Court must reserve to itself sufficient flexibility to address the application of that Article in other contexts which might arise. It is not therefore prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article…"

49. The court's conclusion in *D* is at paragraphs 51 – 54:

> "51 The Court notes that the applicant is in the advanced stages of a terminal and incurable illness. At the date of the hearing, it was observed that there had been a marked decline in his condition and he had to be transferred to a hospital. His condition was giving rise to concern… The limited quality of life he now enjoys results from the availability of sophisticated treatment and medication in the United Kingdom and the care and kindness administered by a charitable organisation. He has been counselled on how to approach death and has formed bonds with his carers…
>
> 52 The abrupt withdrawal of these facilities will entail the most dramatic consequences for him. It is not disputed that his removal will hasten his death. There is a serious danger that the conditions of adversity which await him in St Kitts will further reduce his already limited life expectancy and subject him to acute mental and physical suffering. Any medical treatment which he might hope to receive there could not contend with the infections which he may possibly contract on account of his lack of shelter and of a proper diet as well as exposure to the health and sanitation problems which beset the population of St

> Kitts… While he may have a cousin in St Kitts…, no evidence has been adduced to show whether this person would be willing or in a position to attend to the needs of a terminally ill man. There is no evidence of any other form of moral or social support. Nor has it been shown whether the applicant would be guaranteed a bed in either of the hospitals on the island which, according to the Government, care for AIDS patients…
>
> 53 In view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant's fatal illness, the implementation of the decision to remove him to St Kitts would amount to inhuman treatment by the respondent State in violation of Article 3.
>
> The Court also notes in this respect that the respondent State has assumed responsibility for treating the applicant's condition since August 1994. He has become reliant on the medical and palliative care which he is at present receiving and is no doubt psychologically prepared for death in an environment which is both familiar and compassionate. Although it cannot be said that the conditions which would confront him in the receiving country are themselves a breach of the standards of Article 3, his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment. Without calling into question the good faith of the undertaking given to the Court by the Government…, it is to be noted that the above considerations must be seen as wider in scope than the question whether or not the applicant is fit to travel back to St Kitts.
>
> 54 Against this background the Court emphasises that aliens who have served their prison sentences and are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State during their stay in prison. However, in the very exceptional circumstances of this case and given the compelling humanitarian considerations at stake, it must be concluded that the implementation of the decision to remove the applicant would be a violation of Article 3."

50. Is the exception to the Article 3 paradigm vouched by the *D* case limited to a state of affairs in which the applicant is, in effect, on his deathbed whether or not he is removed from the host State? I have already set out paragraph 43 from *N v UK* in Strasbourg. However this is only part of the court's overall reasoning at paragraphs 42 – 45, all of which repays attention for a proper understanding of the *D* exception:

> "42. In summary, the Court observes that since *D v the United Kingdom* it has consistently applied the following principles.

> Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In the *D* case the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.

43. The Court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling. However, it considers that it should maintain the high threshold set in *D v the United Kingdom* and applied in its subsequent case-law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.

44. Although many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights… While it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States.

45. Finally, the Court observes that, although the present application, in common with most of those referred to above, is concerned with the expulsion of a person with an HIV and AIDS-related condition, the same principles must apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which

> may cause suffering, pain and reduced life expectancy and require specialised medical treatment which may not be so readily available in the applicant's country of origin or which may be available only at substantial cost."

51. The principles there described need to be considered alongside the earlier decision of the House of Lords in the same case: *N v Secretary of State* [2005] 2 AC 296, [2005] UKHL 31. Counsel are (plainly rightly) agreed that this court is bound by the House of Lords' judgment on the scope of the *D* exception. I shall come to the speeches of their Lordships, but should at this stage make it clear that in my judgment there is no tension, let alone inconsistency, between the approach of the House and the approach of the Strasbourg court. However I should note that paragraphs 42 – 45 in *N* constitute the views of the majority of the court; Judges Tulkens, Bonello and Spielmann delivered a joint dissenting opinion. The difference of view was later the subject of comment by the court in *Mwanje v Belgium* (2013) 56 EHRR 35. A Joint Partially Concurring Opinion of six judges (including Judge Tulkens) at paragraph OI-5 in *Mwanje* considered themselves to be bound "for the purposes of legal certainty, to follow the approach of the Grand Chamber in the case of *N v United Kingdom*". But they continued at paragraph OI-6:

> "We believe however that such an extreme threshold of seriousness – to be nearing death – is hardly consistent with the letter and spirit of art.3, an absolute right which is among the most fundamental rights of the Convention and which concerns an individual's integrity and dignity. In this regard, the difference between a person on his or her deathbed and a person who everyone acknowledges will die very shortly would appear to us to be minimal in terms of humanity. We hope that the Court may one day review its case law in this respect."

52. No doubt it is not for us to pass upon the view of judges of the Strasbourg court as to the approach to be taken in principle to the scope of Article 3, not least in a case in which the United Kingdom was not the respondent. But I may perhaps be allowed to observe, with respect, that the gravity of what may befall an Article 3 claimant is not the only test of his claim. It has to be shown that the impugned State should be held responsible for his plight. As regards that, the nature of the paradigm case and the scope of its proper exceptions are surely critical. But in any case these judicial reservations in relation to the case of *N* cannot qualify our duty to follow the decision of the House of Lords in the same case.

53. Before I come to *N v Secretary of State* I should however note the submission of Miss Lieven QC for GS and EO that the scope of exceptional circumstances is fact-sensitive, and the case of *N* has to be regarded in the light (or perhaps the shadow) of other Article 3 cases in Strasbourg, notably *MSS v Belgium & Greece* (2011) 53 EHRR 2 and *Sufi & Elmi v UK* (2012) 54 EHRR 9. It is convenient at this stage to look at these decisions, and briefly at two others.

MSS v Belgium & Greece (2011) 53 EHRR 2, Sufi & Elmi v UK (2012) 54 EHRR 9, SHH v UK (2013) 57 EHRR 18 and Tarakhel v Switzerland (Application No. 29217/12)

54. In *MSS* the applicant was an Afghani asylum-seeker whom the Belgian authorities desired to return to Greece under the Dublin Convention. He had been detained for a week in Greece before arriving in Belgium. At length he was returned from Belgium to Greece where he claimed asylum. There was much evidence before the Strasbourg court of the extremely deleterious conditions in which asylum-seekers in Greece might be detained or had to live. The court concluded as follows:

> "249. The Court has already reiterated the general principles found in the case-law on Article 3 of the Convention and applicable in the instant case (see paragraphs 216-222 above). It also considers it necessary to point out that Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home… Nor does Article 3 entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living…
>
> 250. The Court is of the opinion, however, that what is at issue in the instant case cannot be considered in those terms… [T]he obligation to provide accommodation and decent material conditions to impoverished asylum seekers has now entered into positive law and the Greek authorities are bound to comply with their own legislation, which transposes Community law, namely Directive 2003/9 laying down minimum standards for the reception of asylum seekers in the Member States ('the Reception Directive'…). What the applicant holds against the Greek authorities in this case is that, because of their deliberate actions or omissions, it has been impossible in practice for him to avail himself of these rights and provide for his essential needs.
>
> 251. The Court attaches considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection… It notes the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the European Union Reception Directive.
>
> 252. That said, the Court must determine whether a situation of extreme material poverty can raise an issue under Article 3.
>
> 253. The Court reiterates that it has not excluded 'the possibility that the responsibility of the State may be engaged [under Article 3] in respect of treatment where an applicant, who was wholly dependent on State support, found herself

> faced with official indifference in a situation of serious deprivation or want incompatible with human dignity'…
>
> 254. It observes that the situation in which the applicant has found himself is particularly serious. He allegedly spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. Added to that was the ever-present fear of being attacked and robbed and the total lack of any likelihood of his situation improving. It was to escape from that situation of insecurity and of material and psychological want that he tried several times to leave Greece.
>
> …
>
> 263. In the light of the above and in view of the obligations incumbent on the Greek authorities under the European Reception Directive…, the Court considers that the Greek authorities have not had due regard to the applicant's vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention."

55. I will consider in due course what is to be drawn from this case. I turn next to *Sufi & Elmi.*

56. The applicants in that case were Somalian nationals who had committed criminal offences in this country. The Secretary of State proposed to deport them to Somalia. The Strasbourg court said this at paragraph 279:

> "279. In the recent case of *MSS v Belgium and Greece*... the Court stated that it had not excluded the possibility that the responsibility of the State under Article 3 might be engaged in respect of treatment where an applicant, who was wholly dependent on State support, found himself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity (paragraph 253)."

The court proceeded to summarise paragraphs 254 and 264 of *MSS*, and observed that at paragraph 367 in *MSS* Belgium was found to be in breach of Article 3: "by

transferring the applicant to Greece the Belgian authorities knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment". The court continued at paragraph 280 of *Sufi & Elmi*:

> "280. In the present case the Government submitted, albeit prior to the publication of the Court's decision in *MSS v Belgium and Greece*, that the appropriate test for assessing whether dire humanitarian conditions reached the Article 3 threshold was that set out in *N v the United Kingdom*. Humanitarian conditions would therefore only reach the Article 3 threshold in very exceptional cases where the grounds against removal were 'compelling'.
>
> 281. The Court recalls that *N v the United Kingdom* concerned the removal of an HIV-positive applicant to Uganda, where her lifespan was likely to be reduced on account of the fact that the treatment facilities there were inferior to those available in the United Kingdom. In reaching its conclusions, the Court noted that the alleged future harm would emanate not from the intentional acts or omission of public authorities or non-State bodies but from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country. The Court therefore relied on the fact that neither the applicant's illness nor the inferior medical facilities were caused by any act or omission of the receiving State or of any non-State actors within the receiving State.
>
> 282. If the dire humanitarian conditions in Somalia were solely or even predominantly attributable to poverty or to the State's lack of resources to deal with a naturally occurring phenomenon, such as a drought, the test in *N v the United Kingdom* may well have been considered to be the appropriate one. However, it is clear that while drought has contributed to the humanitarian crisis, that crisis is predominantly due to the direct and indirect actions of the parties to the conflict. The reports indicate that all parties to the conflict have employed indiscriminate methods of warfare in densely populated urban areas with no regard to the safety of the civilian population… This fact alone has resulted in widespread displacement and the breakdown of social, political and economic infrastructures. Moreover, the situation has been greatly exacerbated by al-Shabaab's refusal to permit international aid agencies to operate in the areas under its control, despite the fact that between a third and a half of all Somalis are living in a situation of serious deprivation…
>
> 283. Consequently, the Court does not consider the approach adopted in *N v the United Kingdom* to be appropriate in the circumstances of the present case. Rather, it prefers the approach adopted in *MSS v Belgium and Greece*, which

> requires it to have regard to an applicant's ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame (see *MSS v Belgium and Greece*, cited above, paragraph 254)."

57. There appears to be a fork in the road, on the court's own reckoning, between the approach in *N v UK* on the one hand and *MSS* on the other. It is on the face of it difficult to find any governing principle, applied across the learning, which provides a *rationale* for departures from the Article 3 paradigm. There are, however, certain strands of reasoning. In *MSS* it is to be noted that Greece (unlike Belgium) was not impugned for breach of Article 3 on account of anything that would happen to the applicant in a third country to which Greece proposed to remove him, but by reason of his plight in Greece itself. One may compare the case of *Limbuela* [2006] 1 AC 396, in which the House of Lords was concerned with the dire straits to which certain asylum-seekers in this country were reduced for want of access to public funds, and held that there was a violation of Article 3. In *MSS* a critical factor was the existence of legal duties owed by Greece under its own law implementing EU obligations: paragraphs 250 and 263 which I have cited; and it is clear that the court attached particular importance to the fact that the applicant was an asylum-seeker.

58. In *Sufi & Elmi* the court avowedly followed *MSS* (paragraph 283). In this case the critical factor was that the "crisis is predominantly due to the direct and indirect actions of the parties to the conflict": paragraph 282. This is closer to the paradigm than the ill-treatment in question in *MSS*, for it must have involved deliberate acts.

59. Thus in *MSS* and *Sufi & Elmi* the court looked for particular features which might bring the case within Article 3, and found them – in Greece's legal duties and the applicant's status as an asylum-seeker, and in the nature of the crisis in Somalia.

60. One may contrast the case of *SHH v UK* (2013) 57 EHRR 18, in which a severely disabled Afghani claimed that he would face a real risk of ill-treatment if he were returned to Afghanistan. The court referred both to *MSS* and *Sufi & Elmi* (see paragraphs 76 and 77) but followed neither; it held that the correct approach was that set out in *N*:

> "92. The Court therefore considers that, in the circumstances of the present case where the problems facing the applicant would be largely as a result of inadequate social provisions through a want of resources, the approach adopted by the Court in *N v the United Kingdom*, cited above, is more appropriate. The Court will therefore need to determine whether or not the applicant's case is a very exceptional one where the humanitarian grounds against removal are compelling."

Applying *N*, the court held (paragraph 95) that no sufficiently exceptional circumstances were shown.

61. In *Tarakhel v Switzerland* (Application No. 29217/12) the applicants, who were Afghani asylum-seekers, claimed that if they were returned to Italy (which had accepted, or was taken to have accepted, responsibility for deciding their asylum

claims) they would be liable to be subjected to inhuman and degrading treatment linked to the existence of "systemic deficiencies" in the reception arrangements for asylum-seekers in that country. The court at paragraph 101 "[considered] it necessary to follow an approach similar to that which it adopted in the *MSS* judgment", and concluded (paragraph 122) "that, were the applicants to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, there would be a violation of Article 3 of the Convention". The case shows the importance attached by the court to the treatment of asylum-seekers: paragraphs 93, 97, 99, 102-104.

62. This learning shows that there may be departures from the Article 3 paradigm other than of the kind vouchsafed in *D v UK*. These departures are variously justified. But such an approach is indicated in *D* itself, at paragraph 49, and in *N* at paragraph 43. I have already cited both passages:

> "49… [G]iven the fundamental importance of Article 3 in the Convention system, the Court must reserve to itself sufficient flexibility to address the application of [Article 3] in other contexts which might arise."
>
> "43. The Court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling."

In my judgment it is clear that the departures from the Article 3 paradigm given in *MSS* and the other cases to which I have referred do not extend the reach of the departure allowed in *D* and discussed at paragraphs 42 – 45 of *N v UK*. The plight of an individual whose life expectancy may be severely shortened by his removal or deportation to his home State is a distinct state of affairs whose treatment under the Convention is not qualified by the court's approach, for example, to the reception conditions for asylum-seekers. The circumstances in which a departure from the Article 3 paradigm is justified are variable; the common factor is that there exist very pressing reasons to hold the impugned State responsible for the claimant's plight. But the fact that there are other exceptions unlike *D* or *N* does not touch cases – such as these – where the claimant's appeal is to the very considerations which *D* and *N* address.

63. Accordingly, in my judgment, the Strasbourg jurisprudence in cases such as *MSS* and *Sufi & Elmi* casts no significant light on the approach to be taken by this court to the binding authority of *N v Secretary of State* in the House of Lords, to which I now turn.

N v Secretary of State [2005] 2 AC 296, [2005] UKHL 31

64. Like D, the appellant suffered from AIDS. She was a Ugandan woman whom the Secretary of State proposed to return following the failure of her asylum claim. She had received specialist medical care in this country over a prolonged period. Lord Nicholls of Birkenhead noted (at paragraph 3 of his speech):

> "Her condition is stable. Her doctors say that if she continues to have access to the drugs and medical facilities available in the United

> Kingdom she should remain well for 'decades'. But without these drugs and facilities her prognosis is 'appalling': she will suffer ill-health, discomfort, pain and death within a year or two."

But her chances of receiving the necessary medical care in Uganda were "problematic". If she could not obtain it, her situation would be "similar to having a life-support machine switched off" (paragraph 4). The question was whether her expulsion to Uganda would violate her Article 3 right. It was held that it would not.

65. With deference to the arguments advanced by counsel for the appellants it seems to me that the *ratio decidendi* of *N* in the House of Lords is entirely plain. I give the following citations:

> "15. Is there, then, some other rationale [sc. other than the pressing nature of the humanitiarian claim] underlying the decisions in the many immigration cases where the Strasbourg court has distinguished *D's* case? I believe there is. The essential distinction is not to be found in humanitarian differences. Rather it lies in recognising that article 3 does not require contracting states to undertake the obligation of providing aliens indefinitely with medical treatment lacking in their home countries. In the case of *D* and in later cases the Strasbourg court has constantly reiterated that in principle aliens subject to expulsion cannot claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social and other forms of assistance provided by the expelling state. Article 3 imposes no such 'medical care' obligation on contracting states. This is so even where, in the absence of medical treatment, the life of the would-be immigrant will be significantly shortened. But in the case of *D*, unlike the later cases, there was no question of imposing any such obligation on the United Kingdom. *D* was dying, and beyond the reach of medical treatment then available." (*per* Lord Nicholls)

> "36. What was it then that made the case exceptional? It is to be found, I think, in the references to D's 'present medical condition' (para 50) and to that fact that he was terminally ill (paras 51: 'the advanced stages of a terminal and incurable illness'; para 52: 'a terminally ill man'; para 53: 'the critical stage now reached in the applicant's fatal illness'; Judge Pettiti: 'the final stages of an incurable illness'). It was the fact that he was already terminally ill while still present in the territory of the expelling state that made his case exceptional." (*per* Lord Hope)

> "69. In my view, therefore, the test, in this sort of case, is whether the applicant's illness has reached such a critical stage (ie he is dying) that it would be inhuman treatment to deprive him of the care which he is currently receiving and send him

> home to an early death unless there is care available there to enable him to meet that fate with dignity." (*per* Lady Hale)

See also *per* Lord Brown at paragraphs 89 – 94.

66. These citations demonstrate that in the view of the House of Lords the *D* exception is confined to deathbed cases. Miss Lieven submitted that the focus of their Lordships' reasoning (at least that of Lord Nicholls) was upon those with AIDS, a condition much more often suffered than ESKD; so that the strictures in *N* should not be taken to apply to the latter class of case. But that would be merely adventitious, and therefore unprincipled; and I can find nothing to support it in their Lordships' speeches.

67. This result is all of a piece with the repeated statements in the Strasbourg court that "[a]liens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State" (*N v UK* paragraph 42; cf paragraph 44, and paragraph 54 in *D v UK*).

68. In my judgment none of these appellants fall within the kind of exceptional case addressed in *D* and *N*.

FURTHER POINTS ON ARTICLE 3

69. There are four further issues on Article 3.

GM – Transplant?

70. The first concerns the appellant GM. As I have said, in May 2014 Guy's Hospital indicated their willingness to assess GM's suitability for a live donor transplant, and by 1 July 2014 it was clear that the proposed donor, Emmanuel Mugisha, was compatible. If there is a real possibility of this transplant in the near future (the details have not been gone into before us), there may be a question whether GM's removal from the United Kingdom before it is carried out would violate Article 3 on the specific footing that to deprive him of such an imminent and transformative medical recourse amounts to inhuman treatment.

71. However this factual development postdates the UT decision in GM's case by some distance. It cannot of itself invalidate that determination and therefore affords no ground for relief in these proceedings. As I have made clear, GM's case is to be remitted to the Upper Tribunal by consent for further consideration of his claim under Article 8. But that may be thought not to encompass this further development relating to a possible transplant, which might be regarded as arising only under Article 3. In the circumstances GM may, on advice, wish to put the matter before the Secretary of State as a fresh Article 3 claim.

72. The remaining points on Article 3 all arise from submissions of Mr Manjit Gill QC on behalf of KK.

KK – Lawful Presence in UK

73. The first of these was that because KK's presence in the UK had never been unlawful, but always with leave, his Article 3 case should not be subject to the rigour of the *D* exception. Mr Gill drew attention to the distinction made in *JA & ES v Secretary of State* [2009] EWCA Civ 1353, [2010] INLR 353, for the purpose of Article 8, between those with and those without leave to remain. He submitted in terms that the reasoning in *N v UK* at paragraphs 42 – 43 has no application to a person with a current leave to remain. KK is, he urged, legally entitled to medical treatment by virtue of his lawful residence here.

74. The argument has a meretricious quality, given that the Secretary of State proposes to deport KK in light of his guilt of what are undoubtedly serious criminal offences. But in any event it is misconceived. The fact that KK is entitled to medical treatment while he is here with leave does not in the least inhibit the Secretary of State's power to curtail his leave and deport him on public interest grounds. More generally, Mr Gill's submission rests on a false premise, namely that some distinction is to be drawn for the purpose of Article 3 between persons with a blameless immigration history and others who are illegal entrants or overstayers. It is elementary that Article 3 is an unqualified right, its scope untouched by the merits or demerits of its claimants. The fact that to date KK has been here with leave is simply irrelevant to the force of his case pursuant to Article 3.

KK – P (DRC) v Secretary of State [2013] EWHC 3879

75. Mr Gill's next point arises from paragraph 50(v) of his skeleton argument, which refers to "evidence now available of a real risk of questioning and of unlawful detention causing more harm and stress and worsening the conditions in which the risk of an Article 3 degradation could arise". Mr Gill developed this in the course of his submissions at the hearing, since when we have had notes on the point from Ms Giovanetti QC for the Secretary of State and Mr Gill in reply.

76. Mr Gill's argument critically depends on the judgment of Phillips J in *P (DRC) v Secretary of State* [2013] EWHC 3879, delivered in December 2013 (after argument in October 2013), many months after the UT's determination in KK's case. At paragraph 44 Phillips J stated:

> "[C]riminal deportees to the DRC, if identified as such, will be detained on arrival for an indeterminate period… [S]uch detention is likely to be in conditions which contravene Article 3 of the ECHR…"

Later in the judgment:

> "48. The Defendant's reasoning for entirely discounting that acknowledged risk in the case of [criminal deportees] is that the UKBA's re-documentation process does not identify a returnee as a criminal deportee, so there is no real risk to them unless the criminal offences in question had generated publicity identifying the offender as a DRC national…"

Then after noting that returnees from the United Kingdom would be questioned, and (having regard to observations of Lord Kerr in *RT (Zimbabwe) v. Secretary of State for the Home Department* [2013] 1 AC 152 at paragraphs 71 – 72) discounting the suggestion that a criminal returnee might lie about his activities, Phillips J continued:

> "52. In the case of criminal deportees to DRC, it is clear that they will be interrogated on arrival, no doubt by professional, skilled and experienced immigration officials. According to the French embassy, those officials are specifically looking out for criminal deportees and no doubt able to probe for information and look for signs which would demonstrate that a returnee has been imprisoned in the United Kingdom. There would seem to be an obvious and serious risk that a criminal deportee such as P would not be able to hide the fact of his convictions in the face of interrogation designed to elicit that very fact."

77. Mr Gill submitted that at the time of the hearing before the UT the Secretary of State knew of the risks on return that KK would or might face given his criminal offences in this country; and accordingly owed a duty to inform the UT of the existence of those risks.

78. Before Phillips J the Secretary of State relied in particular on the terms of a Country Policy Bulletin of November 2012. At paragraph 16 Phillips J cited paragraph 11 of the Bulletin:

> "The consensus within the FFM [sc. a Fact Finding Commission which published a report in November 2012] is that returnees per se do not face a risk of detention, unless they committed a known offence, or have a recognised profile of opposition to the DRC government…"

The Bulletin also has this:

> "The reality is… that no indication of status is given in the redocumentation process. The only potential for the DRC authorities to learn of a serious crime committed in the UK by one of its nationals is if the crime attracted significant media publicity and the offender was identified as a DRC national."

79. We have seen no evidence of any significant media publicity of the crimes which have led to the decision to deport KK, or of his being identified as a DRC national. Plainly, however, Phillips J was impressed by the evidence showing the likelihood of interrogation on return. But as at January 2013, when the UT decided KK's appeal, the inference must be that the Secretary of State's position on risk on return (had it been thought necessary to canvass the issue in depth) would have been based on the material in the 2012 Bulletin and the FFM Commission report.

80. Mr Gill's submission invites the court to proceed in effect on the basis that the conclusions reached by Phillips J in December 2013 should have been in the mind of

the Secretary of State all but a year earlier. There is no warrant for such a conclusion. If KK's advisers consider, on information now available, that there is a substantial case on risk on return which was not advanced to the UT, the proper course is to seek to place a fresh case before the Secretary of State.

KK – The Facts

81. Mr Gill seeks to impugn the UT's approach to the facts of his client's case on Article 3. I am afraid I think it clear that the series of points taken in his skeleton argument for the most part raise no issue of law whatever. They do no more than urge a different view from that taken by the tribunal. As I have said, the UT on 31 January 2013 conducted a full re-hearing on the merits and took oral evidence. There is no proper basis for overturning their factual conclusions in this court. I shall say a little more about their approach to the case in dealing with Article 8.

82. There is however one specific point taken by Mr Gill which I should confront. The UT found that KK would be supported and cared for by his wife in the DRC, who works as a qualified nurse; and that it would be possible to fund his treatment there (paragraph 66). Mr Gill's submission is that the FTT which had earlier dismissed KK's wife's appeal against the Secretary of State's refusal of entry clearance did not accept that she was legally married to him, or that there was a genuine and subsisting marriage, or that they intended to live together permanently, or that she was working, whether as a nurse or otherwise. Mr Gill says that these findings should have been the starting-point for the UT's later consideration of KK's Article 3 appeal. He cites *Devaseelan* [2002] UKIAT 00702 to that effect; but, he submits, *Devaseelan* was not even considered by the UT.

83. However the FTT hearing KK's wife's appeal had received no oral evidence. The UT on KK's own appeal was plainly in a position to reach autonomous findings on the issues before it. The Immigration Appeal Tribunal In *Devaseelan* amply recognised (paragraph 37) that "the outcome of the hearing before the second Adjudicator may be quite different from what might have been expected from a reading of the first determination only". *Devaseelan* is not, in my judgment, in the least persuasive of any conclusion that the UT in this case were at all inhibited from deciding as they did.

CONCLUSION ON ARTICLE 3

84. If my Lords agree with my view of *N v Secretary of State* in their Lordships' House, and the further points which I have just addressed, the case is concluded against the appellants on Article 3. They cannot bring themselves within what may be called the *D* exception. Their plight, however grave, cannot be alleviated by recourse to Article 3. In my judgment all six appeals must be dismissed so far as they seek to overturn the UT's determinations on the Article 3 claims.

THE ARTICLE 8 CLAIMS

85. It is common ground that in cases where the claimant resists removal to another State on health grounds, failure under Article 3 does not necessarily entail failure under Article 8. In her skeleton argument at paragraph 55 Ms Giovanetti for the Secretary of State cites *JA (Ivory Coast) & ES (Tanzania) v SSHD* [2009] EWCA Civ 1353, in which the appellants had been given a "de facto commitment" that they would be

allowed to remain in the UK for treatment. Sedley LJ, with whom Longmore and Aikens LJJ agreed said this at paragraph 17:

> "There is no fixed relationship between Art. 3 and Art. 8. Typically a finding of a violation of the former may make a decision on the latter unnecessary; but the latter is not simply a more easily accessed version of the former. Each has to be approached and applied on its own terms, and Ms Giovannetti is accordingly right not to suggest that a claim of the present kind must come within Art. 3 or fail. In this respect, as in others, these claims are in Mr Knafler's submission distinct from cases such as *D* and *N*, in both of which the appellant's presence and treatment in the UK were owed entirely to their unlawful entry ..."

86. If the Article 3 claim fails (as I would hold it does here), Article 8 cannot prosper without some separate or additional factual element which brings the case within the Article 8 paradigm – the capacity to form and enjoy relationships – or a state of affairs having some affinity with the paradigm. That approach was, as it seems to me, applied by Moses LJ (with whom McFarlane LJ and the Master of the Rolls agreed) in *MM (Zimbabwe)* [2012] EWCA Civ 279 at paragraph 23:

> "The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be relevant to Article 8, is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage Article 8. Suppose, in this case, the appellant had established firm family ties in this country, then the availability of continuing medical treatment here, coupled with his dependence on the family here for support, together establish 'private life' under Article 8. That conclusion would not involve a comparison between medical facilities here and those in Zimbabwe. Such a finding would not offend the principle expressed above that the United Kingdom is under no Convention obligation to provide medical treatment here when it is not available in the country to which the appellant is to be deported."

87. With great respect this seems to me to be entirely right. It means that a specific case has to be made under Article 8. It is to be noted that *MM (Zimbabwe)* also shows that the rigour of the *D* exception for the purpose of Article 3 in such cases as these applies with no less force when the claim is put under Article 8:

> "17. The essential principle is that the ECHR does not impose any obligation on the contracting states to provide those liable to deportation with medical treatment lacking in their 'home countries'. This principle applies even where the consequence will be that the deportee's life will be significantly shortened (see Lord Nicholls in *N v Home Secretary* [2005] 2 AC 296, 304 [15] and *N v UK* [2008] 47 EHRR 885 (paragraph 44)).

> 18. Although that principle was expressed in those cases in relation to Article 3, it is a principle which must apply to Article 8. It makes no sense to refuse to recognise a 'medical care' obligation in relation to Article 3, but to acknowledge it in relation to Article 8."

GS, EO & BA: Should the Court Consider Article 8 At All?

88. Before the UT neither GS, EO or BA made any specific case under Article 8; indeed they made no Article 8 case whatever. The question therefore arises whether there is any proper basis on which in this court they may raise Article 8 against the UT's determinations. Our jurisdiction is only to consider alleged errors of law by the tribunal.

89. Generally, the UT will not make an error of law by failing to consider a point never put to it. That is not, however, an absolute rule. Sometimes new issues are (in the lamentable *patois* of the cases) "Robinson obvious". The reference is to *Robinson v Secretary of State* [1998] QB 929, in which it was held at paragraph 39 that the appellate authorities

> "are not required to engage in a search for new points. If there is readily discernible an obvious point of Convention law which favours the applicant although he has not taken it, then the special adjudicator should apply it in his favour, but he should feel under no obligation to prolong the hearing by asking the parties for submissions on points which they have not taken but which could be properly categorised as merely 'arguable' as opposed to 'obvious'… When we refer to an obvious point we mean a point which has a strong prospect of success if it is argued. Nothing less will do."

The *Robinson* hurdle is a high one: see my observations in *R (Khatoon) v ECO Islamabad & Anor* [2014] EWCA Civ 1327 at paragraph 21. There is no question of a "Robinson obvious" point on Article 8 arising in the appellants' favour here.

90. However it is also the case – and this is commonplace in appeals generally – that within a ground of appeal directed to a conclusion of the lower court or tribunal, a particular legal argument (perhaps based on new authority) may be advanced which had not been raised before. But again that is not this case. An Article 8 claim is, to borrow the language of private law, a different cause of action from Article 3. Its presentation in this court is not a fresh argument on an issue which was before the UT. Its introduction cannot be justified merely because it shares the same purpose – to overturn the Secretary of State's adverse decision – as the case put before the tribunal. To allow such a state of affairs would, at the appellant's choice, turn every appeal into an argument at large.

91. The real question on the Article 8 claims sought to be advanced by GS, EO and BA is whether those claims were sufficiently before the UT so as to render the tribunal amenable to challenge in this court for failure to deal with them according to law. On this issue we have been assisted by written submissions from counsel put in after the hearing, for which the court is grateful.

92. GS first appealed the Secretary of State's decision on both Article 3 and Article 8 grounds. As I have said the FTT's favourable decision was overturned by the UT which held that no violation of Article 3 or 8 was established. When the case was remitted to the UT by this court, and decided together with EO's appeal, the tribunal observed at paragraph 19:

> "[In both] appeals, the appellants rely exclusively upon Article 3 of the ECHR. No reliance is placed on Article 8. Although we invited them to do so, neither counsel for the Secretary of State nor for the appellants sought to address us on Article 8 and, indeed, Mr Bourne invited us not to deal with Article 8 as we had not heard submissions in relation to it."

See also paragraph 85(8), which I will not set out.

93. In EO's case Article 8 had also been live at an earlier stage, but finally the UT said what it said at paragraph 19.

94. Article 8 had also been live in BA's case. His appeal was at length remitted by this court to the UT, as I have said on the footing that the UT had failed to address a positive finding by the FTT, namely that BA would not be able to afford medical treatment in Ghana: more particularly, it was remitted "for reconsideration on the sole point of whether the consequences of lack of funds are capable of making a case exceptional in terms of *N*". The UT dismissed the appeal on grounds akin to its reasons for dismissing the appeals in the cases of GS and EO, and did not enter into Article 8.

95. It is true that the UT, for its part, enjoys a discretion to entertain points not raised in the notice of appeal or respondent's notice: *Kizhakudan v Secretary of State* [2012] EWCA Civ 566, [2012] Imm AR 886. But this does not touch the *Robinson* principle, which remains good law in relation to the scope of *this* court's jurisdiction on appeals from the UT. Nor, in my judgment, is the impact of *Robinson* at all diminished by the decision of this court in *AS (Afghanistan) v Secretary of State* [2009] EWCA Civ 1076, relied on by Miss Lieven in a separate note on behalf of EO. The case concerned the "one-stop" appeal provisions in ss.85 and 120 of the Nationality, Immigration and Asylum Act 2002. The appellants contended that their statutory appeal covered any grounds raised in response to a "one-stop notice" even if they had not been the subject of any decision by the Secretary of State and did not relate to the decision under appeal. This court agreed. My Lord Sullivan LJ said:

> "104. Adopting the wider interpretation would result in the AIT having to take on the role of primary decision-maker in an increased number of cases. There is no material before the Court which would indicate what the extent of that increase might be, but in any event I do not consider that the prospect of some increase is a significant argument in favour of adopting the narrower interpretation. It is common ground that section 85(2) requires the AIT to consider additional asylum and human rights grounds if they are raised by an Appellant in response to a 'One-stop' notice. The issues raised by such grounds – whether an Appellant would face a real risk of

> persecution on return, whether any interference with his family life would be disproportionate – tend to be much more open-textured than the issues raised by Appellants under the Rules."

But this says nothing about the scope of this court's jurisdiction where the point in contention has in terms not been pursued in the tribunal below.

96. In my judgment there is in the circumstances no principled basis on which this court should entertain argument on Article 8 on behalf of GS, EO or BA. As Ms Giovanetti submitted in her post-hearing note, it remains open to them to make further representations to the Secretary of State on Article 8 grounds pursuant to paragraph 353 of the Immigration Rules.

KK

97. Mr Gill complains of the UT's approach to the facts, as he does in relation to Article 3. In my judgment the UT's consideration of KK's Article 8 appeal discloses no error of law. The tribunal acknowledged (paragraph 71) that the decision in *N v Secretary of State* was not dispositive of the Article 8 claim. They recorded (paragraph 72) that KK had been in the UK since 1995 and had been lawfully present throughout; there was, however, no evidence of family life here. He has a sister living in the UK, but his "family life is overwhelmingly in the DRC". At paragraph 74 the UT stated that the "real basis" of his claim to remain in the UK "is his private life by reference to the medical treatment which he receives here", and (paragraph 77) "the positive aspects of his private life in the UK do therefore appear effectively to be confined to the treatment which he receives at Rotherham General Hospital".

98. There is nothing to say on GM's case on Article 8, which will be remitted to the UT by consent. In the other cases, there is no basis upon which the appellants may urge this court to find specific factors which, following *MM (Zimbabwe)*, might give rise to a claim under Article 8 where there is none under Article 3.

CONCLUSION

99. For the reasons I have given I would allow GM's appeal, quash the removal decision in his case and remit his Article 8 appeal to the UT for redetermination. I would dismiss all the other appeals.

Lord Justice Underhill:

100. I agree that these appeals should be dismissed. My reasons are similar to those of Laws LJ, but they do not correspond at all points. Accordingly, and also because of the peculiar importance of the case, I should state them in my own words; but I can do so fairly briefly.

Article 3

101. The starting-point as regards this part of the claim must be that, as the European Court of Human Rights has repeatedly affirmed, article 3 does not confer on a person who is liable to removal the right to remain in the territory of a contracting state in order to benefit from medical treatment which would not be available to him in the state to which he is returned. To put it another way, the returning state cannot be regarded as

having responsibility for the inadequacy of the healthcare system in the country of return or, therefore, for the suffering which the person who is returned may undergo as a result of that inadequacy.

102. The next point is that it is established by the decision of the House of Lords in *N v Secretary of State for the Home Department* [2005] UKHL 51, [2005] 2 AC 296, that that principle applies even where the life of the person removed would be "significantly shortened" by the inability to access treatment – in that case for AIDS – in the country of return. That decision is binding on us; but its reasoning is in any event consistent with that of the subsequent decision in Strasbourg – *N v United Kingdom* (2008) 47 EHRR 39.

103. Ms. Lieven submitted that the circumstances of the ESKD cases with which we are concerned can be distinguished from those in *N*. She argued that the certainty of death within weeks which would face the Appellants (or at least those still on dialysis) if they were removed and unable to access effective treatment differs in character, and not just degree, from the "certainty" of death within a year or so which was understood to face N as a sufferer from AIDS. Whereas the former is a true certainty, the latter represented no more than the best available expert opinion, and left some room for hope – as indeed is illustrated by the rapid development of treatment for HIV. I fear I cannot accept that submission. In *N* the House of Lords explicitly proceeded on the basis that the appellant's removal would lead to her death: Lord Nicholls said that it would be "similar to having a life-support machine switched off" (see para. 4 of his opinion). That being so, it does not seem to me that it can make a difference in principle how soon, or with what degree of probability, the discontinuation of treatment which is the consequence of removal will lead to death.

104. There remains the question whether the present cases fall within the exceptional category established by the decision of the Strasbourg Court in *D v United Kingdom* (1997) 24 EHRR 423. But it is established by *N* in the House of Lords that the essential reasoning in *D* must be taken to be, not that the applicant's removal to St Kitts would cause or accelerate his death, but that it would lead to him dying in inhuman and degrading conditions, without access to any adequate care to alleviate his suffering in the final stages of his illness: see in particular the passage from the opinion of Lady Hale quoted by Laws LJ at para. 65 above. The reasoning of the majority in *N* in the Strasbourg Court is to the same effect: see the final sentence of para. 42 of its judgment quoted by Laws LJ at para. 50 above. That is in accordance with principle. The subject-matter of article 3 is not the right to life as such, which is the subject of article 2, but the prevention of inhuman or degrading treatment.

105. For those reasons I think that the claim under article 3 must fail. I need say nothing about the particular points addressed by Laws LJ at paras. 69-80 of his judgment: I agree entirely with what he says about them. I also agree with his analysis, at paras. 54-63, of *MSS v Belgium and Greece* and the subsequent decisions of the Strasbourg Court in which it is considered.

Article 8

106. I agree with Laws LJ that this Court ought not to entertain in the cases of GS, EO and BA arguments based on article 8 which were not pursued before the Upper Tribunal. But I would not myself regard the obstacle as one of jurisdiction. In my view section 13 of the Tribunals, Courts and Enforcement Act 2007 permits this Court to entertain an appeal on the basis of a point of law not raised below (and not "*Robinson*-obvious"): see *Miskovic v Secretary of State for Work and Pensions* [2011] EWCA Civ 16, *per* Elias LJ at paras. 68-70, Sedley LJ at paras. 109-124 and Moore-Bick LJ at paras. 126-134. Rather, I would exclude these arguments as a matter of discretion. In the cases of GS and EO this is primarily because they made a considered decision not to advance a case based on article 8 before the Upper Tribunal despite being invited to do so: see para. 92 of Laws LJ's judgment. As for BA, which has the more complicated appellate history described by Laws LJ at paras. 18-19, the Appellant did when the matter was first before the Upper Tribunal rely on article 8; but when the case was remitted by this Court, by consent, it was explicitly to consider only whether his inability to pay for treatment in Ghana was "capable of making a case exceptional in terms of *N*" – that is, on a purely article 3 basis. No attempt was made to rely on article 8 at the remitted hearing. Against that background, it would, again, be *prima facie* wrong to allow any such argument to be advanced now. It might nevertheless possibly have been right, in view of the peculiarly grave consequences of removal in these cases, to allow an article 8 case to be pursued in this Court if any of the Appellants had a strong case on that ground. But that is not so: for the reasons which I give below in relation to the cases of KK and PL, any case based only on the inadequacy of the medical treatment available in their countries of return would have failed in any event, and their prospects of establishing any other article 8 case are very poor in the light of their immigration histories.

107. However, the article 8 issue does require to be decided in the cases of KK and PL. The case-law in this area is not very clear about the applicable principles, but I have concluded that the decision of this Court in *MM (Zimbabwe)*, to which Laws LJ refers at paras. 86-87 above, is fatal to the Appellants' claims.

108. The starting-point must be the decision of the House of Lords in *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368. That establishes, following the decision of the Strasbourg Court in *Bensaid v United Kingdom* (2001) 33 EHRR 205, that a decision to remove a person from the United Kingdom where that would prejudice his or her access to medical treatment may in principle engage article 8: see in particular *per* Lord Bingham at paras. 5-10 (pp. 381-4).

109. Both *Razgar* and *Bensaid* concerned treatment for mental illness. However it has since been accepted in this Court that article 8 may be engaged also where the treatment in question is for a physical illness: see *JA (Ivory Coast) v Secretary of State for the Home Department* [2009] EWCA Civ 1353, [2010] Imm AR 381, (where the claimant was suffering from HIV), *R (SQ (Pakistan)) v The Upper Tribunal* [2013] EWCA Civ 1251 (beta thalassaemia) and *AE (Algeria) v Secretary of State for the Home Department* [2014] EWCA Civ 653 (spina bifida). The latter two cases concerned children, but I do not see that that can make any difference in principle. The rationale for the application of article 8 in such cases is not spelt out. In the mental health cases it is that "the preservation of mental stability is … an

indispensable precondition to effective enjoyment of the right to respect for private life": see para. 47 of the judgment in *Bensaid*, adopted in *Razgar* by Lord Bingham at para. 9 (p. 383 E-F) and by Lord Carswell at para. 74 (p. 404 A-B). More particularly, the thinking appears to be that mental stability is "integral to a person's identity or ability to function socially as a person": see the same passage in the opinion of Lord Bingham in *Razgar*. That reasoning is not obviously applicable in cases of physical illness: of course physical illness may have an impact on mental stability, but it does not necessarily do so. In *Pretty v United Kingdom* (2002) 35 EHRR 1 the Court refers to article 8 being concerned with "*physical and* psychological integrity" – see at para. 61 (p. 35) – but the context is very different, and it is not clear to me that that very general language has any application in a case of this kind. Ms. Lieven in her oral submissions said that the reason why article 8 was engaged at least in cases of life-threatening illness was self-evident: to be alive is a pre-requisite of enjoying a private (or family) life. But that would take article 8 far outside its recognised scope and convert a right to respect for private and family life into a right (albeit qualified) to respect for life itself, which is the province of article 2. It would also be inconsistent with the decision of the majority in the Strasbourg Court in *N* that no separate issue arose under article 8 – see para. 53 (p. 902). Nevertheless, unarticulated though the underlying rationale may be, it must be accepted as a matter of authority that article 8 is potentially engaged in cases where removal may prejudice treatment for physical as well as mental illness.

110. However, that raises the question of how, if article 8 is indeed potentially engaged in cases of this kind, that is reconcilable with the principle established in relation to article 3 that a member state is under no obligation to permit a person to remain for the purpose of obtaining medical treatment not available in the country of return. In enunciating that principle in *N* neither the House of Lords nor the Strasbourg Court reviewed its relationship with the potential engagement of article 8 as established in *Bensaid* or *Razgar*: that is indeed one of the criticisms made in the judgment of the minority in Strasbourg in *N* – see para. O-I26 (pp. 911-2).

111. It is that question which this Court addressed in *MM (Zimbabwe)*. Moses LJ, with whom the other members of the Court agreed, held that the "no obligation to treat" principle must apply equally in the context of article 8: see paras. 17-18 of his judgment, which Laws LJ sets out at para. 89 above. He then sought to identify what role that left for article 8. He acknowledged that "despite that clear-cut principle, the courts in the United Kingdom have declined to say that Article 8 can never be engaged by the health consequences of removal from the United Kingdom", referring to *Razgar* and also to *AJ (Liberia) v Secretary of State for the Home Department* [2006] EWCA Civ 1736 (another mental health case); but he drew attention to statements in both cases emphasising how exceptional the circumstances would have to be before a breach were established. In particular, he set out, at para. 20, a passage to that effect from the opinion of Lady Hale in *Razgar* which starts with the observation that "it is not easy to think of a foreign health care case which would fail under Article 3 but succeed under Article 8". He concluded, at para. 23 with a passage which Laws LJ has already quoted but which for ease of reference I will set out again:

> "The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be

> deported will be relevant to Article 8, is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage Article 8. Suppose, in this case, the appellant had established firm family ties in this country, then the availability of continuing medical treatment here, coupled with his dependence on the family here for support, together establish 'private life' under Article 8. That conclusion would not involve a comparison between medical facilities here and those in Zimbabwe. Such a finding would not offend the principle expressed above that the United Kingdom is under no Convention obligation to provide medical treatment here when it is not available in the country to which the appellant is to be deported."

There are possibly some ambiguities in the details of the reasoning in that passage, but I think it is clear that two essential points are being made. First, the absence or inadequacy of medical treatment, even life-preserving treatment, in the country of return, cannot be relied on at all as a factor engaging article 8: if that is all there is, the claim must fail. Secondly, where article 8 is engaged by other factors, the fact that the claimant is receiving medical treatment in this country which may not be available in the country of return may be a factor in the proportionality exercise; but that factor cannot be treated as by itself giving rise to a breach since that would contravene the "no obligation to treat" principle.

112. If we apply the approach in *MM (Zimbabwe)* it is in my view sufficiently clear that there was no error of law in the approach of either Tribunal. I take the two cases in turn.

113. In KK*'s* case, any article 8 claim based on the impact that removal would have on the claimant's health could not in truth get off the ground because the Upper Tribunal made a factual finding that he would receive proper treatment for his HIV in the DRC. As regards the other aspects of the case, it is bound to fail because of the findings summarised by Laws LJ at para. 97 above.

114. As for PL, if one leaves aside the issue of the unlikelihood of his receiving access to proper treatment in Jamaica, his claim under article 8 is hopeless. It is true that he has been in the United Kingdom since 2001 and has formed friendships here, principally through his church. It was apparently on that basis that the Judge in the First-tier Tribunal, addressing the first two of the conventional "*Razgar* questions", held that his removal would interfere with his right to respect for his private life, and to a degree which potentially engaged article 8. But for almost all of that period he has been here illegally: he was given leave to enter only as a visitor and has been unlawfully over-staying since November 2002. He made an asylum claim for the first time in 2012 which the Judge found to have no merit. He has no family ties in this country. The Judge rightly held that his friendships were formed in the knowledge that he had no right to remain and that they could not have significant weight in the balance against the legitimate interests of immigration control. In those circumstances, to strike the article 8 balance in his favour only because of the consequences for his health if he were removed, however grave, would be in substance to impose an obligation to treat.

Conclusion

115. Very hard though the outcome is, at least in the ESKD cases, I would accordingly dismiss these appeals, save for that of GM, which must be allowed for the reasons given by Laws LJ.

Lord Justice Sullivan:

116. I agree with the judgment of Laws LJ, save that, for the reasons given by Underhill LJ, I would decline to consider GS, EO and BA's Article 8 arguments as a matter of discretion rather than on the basis of a lack of jurisdiction.